IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

79-5188

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 78-

ROGER COLLINS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respectfully submitted,

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QUESTIONS PRESENTED

I.

Was the jury instruction pursuant to Ga. Code Ann. § 26-604 and § 26-605 constitutional?

II.

Is Georgia's death penalty law, previously upheld in Gregg v. Georgia, 428 U.S. 153 (1976), constitutional?

STATEMENT OF THE CASE

Roger Collins was convicted in the Superior Court of Houston County, Georgia, for raping and bludgeoning to death Delores Luster. He was sentenced to die for the murder; fifteen years imprisonment was imposed for the rape. (R. 54-55, 60). A codefendant, William Durham, was separately tried and convicted; he was given consecutive sentences of life and fifteen years.

Collins' conviction and sentence were affirmed by the Supreme Court of Georgia in Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979). The evidence adduced at Collins' trial, recounted in the appellate decision, was that Collins (1) coerced his victim into the automobile under a pretext of carrying her home, (2) threatened her if he contracted a venereal disease, (3) upon reaching the pecan orchard where the crimes were committed removed the rear seat from the automobile, (4) was the first to rape her, (5) removed from the automobile's trunk a jack and, with the weapon, followed as his codefendant led the victim down a dirt road away from where she had been raped, (6) returned to the car following the murder with blood-spattered feet, (7) instructed his cohorts to lie about the blood should anyone ask, (8) left his thumbprint on the murder weapon, and (9) ultimately admitted raping the victim and hitting her over the head with the jack. Collins v. State, supra at 291-93.

REASONS FOR NOT GRANTING THE WRIT

I. THE JURY INSTRUCTION UNDER GA. CODE ANN. § 26-604 AND § 26-605 WAS CONSTITUTIONAL.

In his first enumeration, Petitioner attempts to equate a portion of the jury instruction given by the trial court to that which this Court found impermissible in Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. ___, 61 L.Ed.2d 39 (1979). A review of the charge as given by the trial court plainly shows it does not come within the purview of Sandstrom.

At the outset of the instruction to the jury during the guilt phase of trial, the trial court charged:

> Every person is presumed innocent until proved guilty. No person shall be convicted of a crime unless each essential element of such crime is proved beyond a reasonable doubt. The burden of proof is upon the State to establish each essential element of the crime beyond a reasonable doubt. A defendant cannot be convicted on mere speculation or conjecture. . . .

(T. 321). Therefore, the jury was first instructed on the presumption of innocence and the state's burden of proving every element of the crimes charged. Thereafter, the jury was instructed "[a]t no time is it the duty of a defendant to prove his innocence." (T. 322).

Having so instructed the jury, the trial court then charged in the language now complained of, to wit:

> A presumption is a conclusion which the law draws from given facts. Each of the following

presumptions that I am going to give you is rebuttable; that is, each is subject to being overcome by evidence to the contrary. Every person is presumed to be of sound mind and discretion. The acts of a person of sound mind and discretion are presumed to be the product of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. A person will not be presumed to act with criminal intention but the trier of facts may find such intention upon consideration of the acts, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is tried.

Criminal intent is a necessary ingredient of crime and proof of that intent must exist before a conviction is authorized. Whether it has been shown is ordinarily for the jury to decide. It may be demonstrated by the acts and conduct of the defendant, it may be inferred from the proven circumstances or it may be presumed where it appears to be the necessary or probable consequence of the defendant's acts.

(T. 327-28). (Emphasis supplied). It is evident that the trial court instructed the jury that the defendant was presumed innocent, that the state had the burden of proving beyond a reasonable doubt every element of the offense, and that the jury could infer criminal intent from the evidence but that criminal intent could not be presumed. Id.

In Sandstrom v. Montana, ___ U.S. ___, 99 S.Ct. ___, 61 L.Ed.2d 39 (1979), this Court held impermissible an instruction to the jury couched in mandatory terms which conceivably required a finding of the element of intent, a necessary element in the offense of "deliberate homicide," upon finding that the defendant had committed the act. The trial court charged, in effect, that intent could be presumed; the language of the charge as given was such that the instruction appeared to mandate a finding of intent, thus relieving the prosecution of its burden of proof.

The charge here complained of offends neither element with which this Court was concerned in Sandstrom. Not only does the charge not mandate a finding of malice, it is plainly an instruction that criminal intent cannot be presumed but may be inferred from the evidence. Second, it is not an irrebuttable direction requiring defendant to proffer a quantum of proof; the evidence presented standing alone allows the jury to determine whether or not criminal intent is present.

In his brief, Petitioner states that "[t]he jury might have neglected the defense of duress[1/] because intention was presumed and there was no testimony to the contrary. The jury was told that this presumption was a conclusion which the law draws unless it is rebutted. Since the defendant did not testify or offer any evidence, the jury obviously could not find that the presumption had been rebutted." (Petitioner's Brief, p. 11). In Petitioner's effort to bring the charge actually given in his trial under the prohibition of Sandstrom, he misreads the plain language of the charge given in his case. The jury was instructed in unambiguous terms that criminal intent may not be presumed.

1/ Duress, or coercion, is no defense to murder even if there were evidence presented. Ga. Code Ann. § 26-906.

Petitioner argues that "[t]here was no evidence whatsoever in this case that Petitioner intended to kill the victim. There was no witness to the killing who testified. Thus the jury was forced to rely upon circumstantial proof for this vital element of the prosecution case." (Petitioner's Brief, p. 11). Of course the jury of necessity relied upon circumstantial proof for the element of intent; how else can intent be demonstrated except by the surrounding circumstances of the act committed? The only alternative means of establishing intent is for the defendant to testify to such intent. The logical extension of Petitioner's argument precludes conviction for any offense in which intent is an element unless the defendant freely admits the requisite intent. This Court in Sandstrom did not forbid the use of inferences in criminal trials.

The jury, as Petitioner contends, might well have presumed from the evidence of Petitioner's actions (which, by the way, involve far more than picking up a jack handle and walking in the direction of the victim and the codefendant) that Petitioner intended to inflict injury on the victim. A jury presumes much in the course of any criminal trial, and more when circumstantial evidence only is presented. 2/ But the jury in Petitioner's case was not instructed that intent to murder must be presumed if certain preliminary facts are found. It was instructed that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will." (T. 327). The jury was also instructed that the presumption was rebuttable. But the jury was not instructed that intent may be presumed. The trial court plainly charged that "[a] person will not be presumed to act with criminal intent. . . ." (T. 327).

2/ This was not solely a circumstantial evidence case; Petitioner admitted raping and striking the victim.

From the evidence the jury may well have inferred that Petitioner intended to inflict or assist in inflicting the injuries upon the victim. Indeed, from the evidence it did so infer. But inferring or presuming from the evidence that Petitioner, because he inflicted the blows, intended the injury, which was a permissible inference from the evidence presented, is a far cry from presuming he committed murder. The offense of murder is not complete until malice is established, and malice, or criminal intent, is a forbidden presumption under Georgia law which must be established by the evidence. The charge as given is improper only if the sole means of conviction in such circumstances is direct evidence on all elements from the mouth of the defendant. That is not what this Court held in Sandstrom.

II. GEORGIA'S DEATH PENALTY LAW, UPHELD BY THIS COURT IN GREGG V. GEORGIA, 428 U.S. 153 (1976), IS CONSTITUTIONAL.

In the second reason asserted for justifying the granting of the writ of certiorari, Petitioner contends that Georgia's death penalty law, as applied, is arbitrary. The primary reason asserted is the fact that Petitioner's codefendant, William Durham, received a life sentence while Petitioner, a participant in the same crime, received a sentence of death. This very issue was raised in the Supreme Court of Georgia on direct appeal. That Court said:

> Collins argues that his death penalty should not be upheld inasmuch as Durham, his co-defendant, was given only a life sentence. We never have followed any simplistic rule that where one of multiple co-defendants is given a life sentence, none of the other co-defendants may be sentenced to death. Neither have we created a per se rule that where the triggerman does not receive the death sentence, it may not be imposed on other participants in the crime. Hall v. State, 241 Ga. 252 (244 SE2d 833) (1978).
>
> The evidence does not establish Durham as the prime mover or sole perpetrator of this murder. Collins' car was used. He was the one who propositioned the victim and offered to take her home. After the victim stated she had a venereal disease to avoid the rape, he told her if he caught the disease from her, he would harm her. He removed the seats from the car that were used in the rape of the victim and raped the victim first. He took the jack

> from the trunk of the car and followed Durham and the victim into the orchard. He had blood on his feet and admitted that he had hit the victim first and then had given the jack to Durham to complete the killing. His fingerprint was on the jack.
>
> Under these circumstances we cannot say that Collins was a bystander or an unwilling or passive participant. On the contrary, the evidence clearly establishes that he was an active participant in all aspects of the rape and murder of the victim. Hill v. State, 237 Ga. 794 (229 SE2d 737) (1976).

243 Ga. at 299-300. Whether Petitioner subjectively believes his codefendant was "more culpable" than he is irrelevant. The fact that his codefendant received a life sentence while Collins received a death sentence is not even prima facie evidence that Georgia's death penalty law is being applied arbitrarily. Ga. Code Ann. § 27-2537(c)(3) requires the Supreme Court of Georgia to determine whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In its consideration of Collins' case, the supreme court did just that. Furthermore, it listed seventeen similar cases in which the death penalty was imposed. Petitioner, ignoring any mitigating evidence that may have been present in his codefendant's case and the myriad cases similar to his in which death sentences were imposed, simply says that because his codefendant received a life sentence and he one of death the law is being arbitrarily applied. Since out of a total of these nineteen cases eighteen resulted in death penalties, it cannot be said that Petitioner's sentence

is disproportionate simply because his codefendant did not also receive a death sentence in his separate trial. The more logical assumption is that there was insufficient evidence at the codefendant's trial to convince a jury beyond a reasonable doubt that the death sentence was appropriate, or that there was sufficient mitigating evidence to convince the sentencing jury to extend mercy to him.

Apparently, Petitioner is arguing for a return to standardized sentencing with no room for discretion; because the codefendant received a life sentence Petitioner should also receive a life sentence. That mechanical approach is the very means of sentencing which defendants of an earlier time challenged and which this Court condemned. In his brief, Petitioner states that "[t]he juxtaposition of the sentences of Durham and petitioner are not 'simply an assertion' but a concrete example of irrationality." (Petitioner's Brief, p. 14). Yet Petitioner does no more than make an assertion.

In view of the thorough review of similar cases by the Supreme Court of Georgia in its affirmance of Petitioner's death sentence, it is plain that that court is properly performing its statutory function. Additionally, this issue is raised for the first time in the petition to this Court for writ of certiorari and has never been presented to the courts of the State of Georgia. This Court does not decide issues raised for the first time in petitions for writs of certiorari. See, e.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969).

Petitioner also attacks the constitutionality of Ga. Code Ann. § 27-2534.1(b)(7), which reads:

> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly

vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

The jury found this circumstance to exist;[3/] additionally, the jury found as a second aggravating circumstance that the offense was committed while the defendant was engaged in the commission of rape. Ga. Code Ann. § 27-2534.1(b)(2). Therefore, the jury found two statutory aggravating circumstances to exist.

On direct appeal, Petitioner attacked the seventh aggravating circumstance as unconstitutionally vague. The Supreme Court of Georgia has addressed that same issue in other cases, as well as Petitioner's. Addressing this issue specifically in Harris v. State, 237 Ga. 718, 732, 230 S.E.2d 1 (1976), sentence vacated on other grounds, Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979), the court said:

> We recognize that there is a possibility of abuse of this statutory aggravating circumstance but we have been given the duty of determining '(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b).' Code Ann. § 27-2537(c)(2). This is a test separate and distinct from our duties specified in § 27-2537(c)(1) and (3). Indeed, if the similar cases test was to be limited to similar statutory aggravating circumstances, we would be limiting application of the statute

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3/ The jury did not find that portion of the statute which involves aggravated battery to the victim.

> to some common statutory aggravating circumstance that would have to appear in each case affirmed.
>
> Under our duty specified in Code Ann. § 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence.

Clearly, the Supreme Court of Georgia recognizes its duty under the law and has evidenced its intent to perform that duty properly.

Furthermore, the jury found a second aggravating circumstance to exist, to wit, that the murder was committed while the defendant was engaged in the commission of rape. Even if the seventh statutory aggravating circumstance were unconstitutional, and it is not, the evidence supported the jury's finding of another statutory aggravating circumstance, therefore the sentence would not be impaired. See, e.g., Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976).

Having briefly recounted the facts of Petitioner's involvement in the crime and referred this Court to the decision of the Supreme Court of Georgia, Respondent need not address further Petitioner's argument that the second statutory aggravating circumstance is inapplicable because the victim was murdered a few feet and a few minutes removed from the location where she was raped.

As for Petitioner's argument that rape is no longer a capital felony under Georgia law, that assertion is incorrect insofar as the Supreme Court of Georgia has held specifically that rape, armed robbery and kidnapping are still capital felonies for the purpose of applying Ga. Code Ann. § 27-2534.1(b)(2).

Peek v. State, 239 Ga. 422, 432, 238 S.E.2d 12 (1977). "Capital felony" is construed "in a generic sense to include those felonies which were capital crimes in Georgia at the time this section of our death penalty statute was enacted." Id. Furthermore, this Court has recognized the practice of using an offense (armed robbery) as a capital offense under the aggravating circumstance provision of Georgia law even though the death penalty can no longer be given for that particular offense. Coker v. Georgia, 433 U.S. 584, 599, n. 15 (1977).

Apologetically characterizing his offense as a mere "routine murder," Petitioner pleads that the death sentence is too severe in his case because his rape and murder of Delores Luster were not sufficiently aggravated, extreme, chilling, jarring or punishment-worthy. Respondent need only direct this Court's attention to the facts of the case establishing Petitioner's involvement.

Finally, Petitioner alleges inadequate representation by his trial counsel. The issue of the effectiveness or ineffectiveness of trial counsel is not properly before this Court since it has nowhere been presented to the courts of the State of Georgia. Tacon v. Arizona, supra; Cardinale v. Louisiana, supra.

CONCLUSION

No sufficient reasons having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, have this day served a true and correct copy of this Brief for Respondent in Opposition upon the Petitioner's attorney by depositing a copy of the Brief in the United States mail, with proper address and adequate postage to:

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This the 10TH day of September, 1979.

Daryl A. Robinson

DARYL A. ROBINSON